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NO. 458

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

COLUSA REMEDY COMPANY, INTERVENER, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY TO THE BRIEF OF UNITED STATES IN OPPOSITION.

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Dated: December, 1949.

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In its brief in opposition, the Government has suggested that the case is moot because the bottles of oil involved in the seizure have been destroyed. Petitioner respectfully submits that either (1) the case is not rendered moot by reason of the destruction of the bottles, or (2) if it has been so rendered moot, the Court should grant certiorari and reverse the judgment of the court below in order that that judgment should not stand as *res judicata* against petitioner.

1. *The destruction of the bottles has not rendered the judgment below moot.*

> *This case and the findings herein are of vital importance to appellant because if and when they become final they will be urged as res judicata on the issue as to the the efficacy of Colusa Oil in the treatment of the skin diseases involved in this case.*

In fact, the judgment and findings in this cause have already been so urged and relied upon by the government in the U. S. District Court at Los Angeles in a proceeding involving this same oil and this same issue and party (*U. S.* v. *Colusa Remedy Company*, No. 8572 WM-Civil, U. S. District Court, Southern District of California, Central Division).

In other words, the mere destruction of the drugs below does not render the cause moot.

The authorities are clear that where a judgment or findings may have some future significance directly affecting the rights of the parties, the cause cannot be said to be moot. The following are cases pertinent to this point:

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283.
Southern Pacific Terminal Co. v. *Interstate Com. Com.*, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.
U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007.
Howard v. *Wilbur* (6 Cir.-1948), 166 F. 2d 884.
Kaufman v. *Mastin*, 66 W. Va. 99, 66 S. E. 92.
Sinquefield v. *Valentine*, 159 Miss. 144, 132 So. 81.

In *Southern Pacific Co.* v. *Interstate Commerce Commission* (supra), the Supreme Court of the United States refused to dismiss an appeal, although the defendant association, under which the defendant railroads illegally fixed rates, was dissolved prior to the appeal. On the question of dismissal of the appeal upon the ground that the questions therein had become moot, the Court said:

> "* * * it is to be observed that clearly the suggestion is without merit, in view of the possible liability for

> reparation to which the railroads might be subjected if the legality of the order were not determined; *and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case* to involve not merely a moot controversy." (Emphasis ours)

The case of *Southern Pacific Terminal Company* v. *Interstate Commerce Commission* (supra), decided at the same time as the above case, is another clear cut case to the same effect.

In the case of *Howard* v. *Wilbur* (supra), the circuit court of appeals notes the many exceptions to the general rule, and, insofar as the discussion in that case is pertinent to the instant case, we quote from the opinion as follows:

> "There is another possible exception to the general rule to the effect that although the issue is moot in the particular case before the court, yet the appeal is not treated as moot where if the judgment is not reversed a party will be precluded from establishing facts which may be vital to his rights in other proceedings. Such an exception seems to have been recognized in *Kaufman* v. *Mastin*, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A., N. S., 855; *Sinquefield* v. *Valentine*, 159 Miss. 144, 132 So. 81, 76 A. L. R. 238."

In the case of *Kaufman* v. *Mastin* (supra), which is cited in *Howard* v. *Wilbur* (supra), the West Virginia Court refused to dismiss an appeal evidently in order to prevent the judgment below becoming res adjudicata to the prejudice of the defendant.

To similar effect is the case of *Sinquefield* v. *Valentine* (supra), also cited in *Howard* v. *Wilbur* (supra), where it appeared that the requested dismissal and refusal to reverse would have left the petitioner in a position where he could not assert his rights.

2. *If the judgment has been rendered moot by the destruction of the bottles, this Court should grant certiorari and reverse.*

It is the well-established practice of this Court that if a judgment has been rendered moot before all appeals have been exhausted, the judgment is not conclusive in a subsequent action. To make this certain, this Court has followed the practice of reversing the judgments of the lower court so that there will be no possibility that the judgment will be regarded as *res judicata.* The very case cited by the Government in support of its plea of mootness, *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft,* 239 U. S. 466, (at page 7 of the Brief in Opposition), held that reversal of the judgment below was required. Similarly see *U. S.* v. *American-Asiatic S. S. Co.,* 242 U. S. 537 (1917); *Commercial Cable Company* v. *Burleson,* 250 U. S. 360 (1919); *Danciger Oil & Refining Company* v. *Smith,* 290 U. S. 599 (1933). More recently see *SEC* v. *Long Island Lighting Co.,* 325 U. S. 833 (1945) and *SEC* v. *Engineers Public Service Co.,* 332 U. S. 788 (1947).

It should be noted that the Government took the action of destroying the bottles before the time for petitioning for certiorari had expired. No reason or justification is given for this action, taken *without notice.* The Government should not be permitted to deprive petitioner of its right to petition this Court for certiorari and at the same time preserve for itself the benefit of the judgment of the court below as *res judicata.*

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3. In the case of *Reilly* v. *Pinkus,* 70 S. Ct. 110, decided November 14, 1949, after the petition for certiorari in this case was printed, the court enforced a fraud order in connection with medical advertising. But in doing so it re-

affirmed the *McAnnulty*[1] decision on which we rely, speaking as follows:

> "But we do accept the McAnnulty decision as a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience. For in the science of medicine, as in other sciences, experimentation is the spur of progress. It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity." (70 S. Ct. 110, 113)

The case at bar comes within this statement of principle. We have a large amount of clear cut factual data (human experiences and reactions in the use of the oil as well as testimony of medical practitioners) in favor of Colusa. The Government's meager case consists essentially of the opinion testimony of only three medical doctors.

CONCLUSION.

Accordingly we submit (1) that the case is not moot, (2) that if it is moot, the Court should grant certiorari and reverse the judgment below, and (3) that the judgment below is contrary to the principle recently announced in *Reilly* v. *Pinkus* (supra).

Respectfully submitted,

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[1] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.